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# **Judiciary Appropriations Committee**

**Monday, March 20, 2006**

**2:00 p.m.**

**28 House Office Building**



# Florida House of Representatives

Fiscal Council  
Judiciary Appropriations Committee

**Allan Bense**  
Speaker

**Jeff Kottkamp**  
Chair

Agenda for  
Date: Monday, March 20, 2006  
Location: 28 House Office Building, Tallahassee, FL  
Time: 2:00 p.m.

- I. Call to Order
- II. Roll Call
- III. HB 191 CS by Rep. Bogdanoff on Guardianship
- IV. Collection of Fees from County Misdemeanant Probationers
  - Dwight Brock, Clerk of Courts, Collier County
  - Jeff Porter, Legislative Advocate, Florida Association of Counties
- V. County Funded Court Employees
  - Elithia V. Stanfield, Assistant County Administrator, Pinellas County
  - Carole Sanzeri, Senior Assistant County Attorney, Pinellas County
  - Elaine New, Court Counsel, 6<sup>th</sup> Judicial Circuit
- VI. Circuit Indigent Services Boards
  - Victoria Montanaro, Executive Director, Justice Administrative Commission
  - Judge Stan Morris, 8th Judicial Circuit
- VII. Department of Revenue Article V Responsibilities Regarding Oversight of County Funding
  - Lisa Echeverri, Deputy Executive Director, Florida Department of Revenue
  - Jeff Porter, Legislative Advocate, Florida Association of Counties
- VIII. Adjournment



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 191 CS                      Guardianship  
**SPONSOR(S):** Bogdanoff; Goodlette; Seiler  
**TIED BILLS:** HB 193                      **IDEN./SIM. BILLS:** SB 356

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Judiciary Appropriations Committee		Brazzell <i>HUR</i>	DeBeauchamp <i>[Signature]</i>
3) Justice Council			
4)			
5)			

### SUMMARY ANALYSIS

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions. Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations; they also may be minors in specific circumstances. A guardian is appointed by a court to manage some or all the legal affairs of a ward. A ward is a person who is unable to manage some or all of his or her legal affairs. This bill amends guardianship law and related trust law to:

- Provide that a guardianship court may appoint a court monitor on an emergency basis to determine whether court action is necessary to protect the ward's interest with no notice to the guardian.
- Provide that a guardian for a ward who had created a trust may sue to modify a trust before the trust becomes irrevocable.
- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

This bill appears to have an insignificant fiscal impact on state government and no fiscal impact on local government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** -- The bill has the potential to increase the number of cases in which a monitor is appointed and, therefore, require a greater number of individuals to serve as monitors and increase the workload of the court.

**Empower families** -- This bill affects family relationships by allowing the court or other concerned parties to intervene when a guardian may be taking advantage of a ward.

#### B. EFFECT OF PROPOSED CHANGES:

##### Introduction

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional or other limitations that prevent them from being able to make their own decisions by reassigning certain rights from the incapacitated individual (the "ward") to another person to exercise of the individual's behalf, in the individual's interests (the "guardian"). Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations, or may be minors experiencing certain circumstances, such as the death of parents. However, at times a guardian does not act in the interest of the ward; alternatively, the guardian, acting in the interest of the ward, after appointment, identifies certain financial abuses of the ward which occurred prior to the guardian's appointment but while the ward was incapacitated. The proposed changes in HB 191 CS are designed to address such situations by:

- Providing that a guardian for a ward who had created a trust while incapacitated, which trust may not be in the best interest of that ward, may sue to modify a trust before the trust becomes irrevocable.
- Providing that a guardianship court may appoint a court monitor on an emergency basis to determine whether court action is necessary to protect the ward's interest with no notice to the guardian.
- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

##### Current law

##### Trusts

A trust is generally defined as:

[A] fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the

legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.<sup>1</sup>

A “grantor” is “one who creates or adds to a trust and includes ‘settlor’ or ‘trustor’ and a testator who creates or adds to a trust.”<sup>2</sup> “Trustee” refers to “an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.”<sup>3</sup>

### Trust Contests

Section 737.2065, F.S., expressly prohibits the bringing of any action to contest the validity of any or all parts of a trust until the trust becomes irrevocable. This section was enacted in 1992, along with similar legislation forbidding the commencement of will contests before the death of the testator.<sup>4</sup>

Generally, revocable trusts are correctly treated as will substitutes, although they serve an additional function that is not contemplated by a will: a revocable trust can serve as the framework for the investment, management, expenditure, and distribution of the grantor’s assets during his or her life.<sup>5</sup> It is because of the similarity between a will and a revocable trust that the Legislature, in 1992, enacted statutes forbidding challenges to either instrument prior to the death of the testator for a will or prior to the trust becoming irrevocable, which typically occurs upon the death of the trust’s settlor.<sup>6</sup> However, because a trust can operate during the settlor’s lifetime, and because the settlor may become incapacitated, there is also a potential guardianship aspect to a trust which, again, is not present in a will. An invalid revocable trust, which administers the grantor’s assets during his or her lifetime, has the potential to cause great harm to the grantor.<sup>7</sup>

### Guardianship

The Legislature has stated the general purpose of the guardianship chapter as follows:

[I]t is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.<sup>8</sup>

As noted elsewhere, the Legislature’s intent in section 744.344, F.S., indicates that a “guardian should be granted no more authority over the ward and his or her property than is necessary for the guardian to address the needs created by the specific incapacities of the ward, so that the substitute decision-making of the guardian leaves the ward with as much personal autonomy as is feasible.”<sup>9</sup>

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<sup>1</sup> 55A Fla. Jur. 2d Trusts s.1.

<sup>2</sup> S. 731.201(17), F.S.

<sup>3</sup> *Id.* at (35).

<sup>4</sup> Wm. Fletcher Belcher, *Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts*, Vol. XXV ActionLine No. 2, 11 (2003). ActionLine is a publication of the Florida Bar’s Real Property, Probate and Trust Law Section.

<sup>5</sup> *Id.*

<sup>6</sup> *See Id.*

<sup>7</sup> Belcher, *Prohibition Against Contesting Revocable Trusts*, at 11.

<sup>8</sup> S. 744.1012, F.S.

<sup>9</sup> *In re Guardianship of Fuqua*, 646 So. 2d 795, 796 (Fla. 1st DCA 1994).

Some of the relevant definitions of terms used in guardianship include: “ward,” a person for whom a guardian has been appointed;<sup>10</sup> “guardian,” a person who has been appointed by the court to act on behalf of a ward’s person, property, or both;<sup>11</sup> and “court monitor,” a person appointed by the court pursuant to s. 744.107, F.S., to provide the court with information concerning a ward.<sup>12</sup>

### Determining Incapacity

Section 744.331, F.S., sets forth the procedures for determining whether a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person; the person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian; and within five days of filing a petition for determination of incapacity, the court must appoint an examining committee which must include a psychiatrist or physician and two other persons, such as a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.<sup>13</sup> Each committee member must examine the person and then issue a joint report evaluating the person’s mental health, functional ability, and physical health.<sup>14</sup> If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.<sup>15</sup> Pursuant to s. 744.331(6), F.S., if the court finds by clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the person’s incapacity, although such incapacity shall extend only to the rights specified in the order. Section 744.331(6)(b), F.S., provides that the “court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward.” Section 744.331(6)(f), F.S., provides that “[w]hen an order is entered which determines a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights.”

### Powers of Guardian Upon Court Approval

Section 744.441(11), F.S., provides that a plenary or limited guardian of the property may “[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in performance of his or her duties.”<sup>16</sup> Other powers given under s. 744.441, F.S., and which a guardian may only exercise with court approval, include executing, exercising, or releasing any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised if not incapacitated, if the execution, exercise, or release would be in the best interest of the ward.<sup>17</sup> Additionally, a guardian may “[c]reate revocable or irrevocable trusts of property of the ward’s estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.”<sup>18</sup> Thus, it appears that a guardian may exercise powers over a revocable trust, which might include the power to revoke the trust.

### Court-Appointed Guardianship Monitors

The “front end” of adult guardianship is the determination of incapacity and appointment of a guardian, and the “back end” is accountability of the guardian and court monitoring.<sup>19</sup> Court monitoring of guardianship is vital to the protection of the ward by providing the court with a way to verify the financial

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<sup>10</sup> S. 744.102(20), F.S.

<sup>11</sup> *Id.* at (8).

<sup>12</sup> *Id.* at (5).

<sup>13</sup> S. 744.333(1)-(3)(a), F.S.

<sup>14</sup> *Id.* at (3)(b)-(c).

<sup>15</sup> *Id.* at (4).

<sup>16</sup> S. 744.411(11), F.S.

<sup>17</sup> *Id.* at (2).

<sup>18</sup> *Id.* at (19).

<sup>19</sup> Hurme, *Guardian Accountability*, 31 STETSON L. REV. at 867.

accounts the guardian provides to the court.<sup>20</sup> Verifying information in personal-status reports requires more personal involvement by the court and is best accomplished by someone who can visit the ward to ascertain the suitability of the ward's living arrangements, the frequency of guardian visits, and the implementation of the care plan.<sup>21</sup>

### Court Monitors

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or on its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.<sup>22</sup> A family member or any other person with an interest in the proceedings may not serve as a monitor.<sup>23</sup> A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee may be paid a fee for serving as a monitor.<sup>24</sup>

This section gives the trial court broad authority to appoint a monitor in guardianship cases, but the statute has been criticized for its lack of guidelines regarding how the court-appointed monitor should perform his or her duties.<sup>25</sup> In 2003, the Florida Supreme Court's Commission on Fairness, Committee on Court Monitoring, issued a report and recommendations finding that greater oversight of court monitors was warranted and recommending an overhaul and expansion of the court monitoring statute.<sup>26</sup>

### Effect of the Bill

#### Trusts

This bill amends s. 737.2065, F.S. to create an exception to the prohibition on filing an action against a trust prior to that trust becoming irrevocable. Under this bill, a challenge to the trust could only be brought by a court-appointed guardian of the person of the incompetent ward/settlor of the trust, and the court would have to make a finding that the challenge to the trust was in the ward's best interests during his or her probable lifetime. This bill creates a requirement that, if the court denied the guardian's request, the court must review whether the ward was still in need of a guardian and whether the current delegation of rights was appropriate to serve the ward's needs. Unless there is a court-appointed guardian of the property of an incapacitated settlor, there cannot be any contest challenging the trust before it becomes irrevocable because, presumably, a competent trust settlor can personally revoke or amend the trust as necessary during the settlor's lifetime.<sup>27</sup>

#### Guardianship

This bill amends s. 744.331, F.S. to require that when a court finds by clear and convincing evidence that a person is incapacitated, the court must enter a written order determining such incapacity, but that the incapacity may only extend to the rights specified in the order. When entering an order of incapacity, the court must consider and determine whether or not there is an alternative to guardianship that will sufficiently meet the needs of the incapacitated person. Unless the court finds that there is a suitable alternative that will sufficiently address the problems of the incapacitated person, a guardian must be appointed. Additionally, this bill amends s 744.331, F.S. to provide that when an interested person files a verified statement asserting a good faith belief that the alleged incapacitated person's

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<sup>20</sup> *Id.* at 907.

<sup>21</sup> *Id.* at 907-08.

<sup>22</sup> S. 744.107, F.S.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on PROPOSED AMENDMENTS TO CHAPTERS 737 & 744, F.S.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



trust, trust amendment, or durable power of attorney is invalid, and a reasonable factual basis for the belief is given, the existence of such an instrument is not considered an alternative to the appointment of a guardian. However, the appointment of a guardian does not preclude the court from determining that specific authority established by a durable power of attorney may still be exercised by the attorney in fact.

This bill amends s. 744.107, F.S. to provide for service of the order of appointment and the monitor's report upon the guardian, the ward, the respective attorneys and other persons, as determined by the court. The bill also authorizes, if necessary, further action by the court to protect the interests of the ward. If further action is warranted upon receipt of the monitor's report, the trial court must conduct a noticed hearing and then take whatever action is necessary to protect the assets of the ward's estate, including suspending a guardian or taking steps to remove a guardian.

This bill amends s. 744.441(11), F.S. to provide that before a guardian may bring an action pursuant to s. 737.2065, F.S., contesting the validity of a trust, the court must first find that the action appears to be in the ward's best interest during the ward's probable lifetime. Furthermore, if the court denies the guardian's request to bring an action under s. 737.2065, F.S., the court must review the ward's continued need for a guardian and the extent of that need, if any.

The bill creates a new section, s. 744.462, F.S., which provides a framework after a guardian has been appointed through which the court may respond to new developments or information which may affect the guardianship proceeding. This section authorizes the court to review the extent of the ward's continued need for a guardian in the event of any new developments such as a judicial determination of the existence of a valid durable power of attorney or a valid trust amendment.

#### Emergency Court Monitors

The bill also creates s. 744.1075, F.S. to provide that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is that the court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.<sup>28</sup>

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor's report, the court shall determine whether there is probable cause to take further action on behalf of the ward's person or property. If there is no probable cause, the court shall issue an order so stating and discharge the monitor.

However, if probable cause exists, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order shall name a time and place for a hearing and provide "a reasonable time to allow for the preparation of a defense after service of the order." The authority of an emergency monitor is limited to sixty days or until an order showing no cause is issued, whichever occurs first. However, the monitor's authority may be extended by thirty days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward's physical or mental health, safety, or assets, including issuing a temporary injunction, restraining order, or an order freezing assets. The court shall give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent. The court may also take any other action authorized by law, including entering a judgment of contempt, ordering an

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<sup>28</sup> S. 744.1075(1), F.S.

accounting, freezing assets, referring the case for criminal charges, filing a complaint with the Department of Children and Families Services, or initiating proceedings to remove a guardian.

Finally, a monitor may be paid a reasonable fee, as determined by the court, which shall be paid from the ward's property. An employee of the state, county, or municipality may not be compensated for conducting an investigation and providing such a report. If the court finds that the motion for a court monitor was filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

#### **C. SECTION DIRECTORY:**

**Section 1.** Amends s. 737.2065, F.S., to state that the guardian of the property for an incapacitated grantor may initiate a trust contest prior to the trust becoming irrevocable.

**Section 2.** Amends s. 744.107, F.S., to establish certain restrictions upon whom the court may name as a monitor, listing certain individuals who have a right to receive the monitor's report, and granting the court power to conduct a hearing should the monitor's report warrant action on behalf of the ward.

**Section 3.** Creates s. 744.1075, F.S., establishing guidelines whereby a court may sua sponte appoint a court monitor on an emergency basis without notice.

**Section 4.** Amends s. 744.331(6)(b) and (f), F.S., regarding procedures to determine incapacity, setting forth procedures for the court to follow when entering an order of incapacity, and establishing requirements for an interested person who wishes to challenge the validity of an incapacitated person's trust, trust amendment, or durable power of attorney.

**Section 5.** Amends s. 744.441(11), F.S., to require a finding by the court that an action to be commenced by the guardian appears to be in the ward's best interests, and stating that if the court denies the guardian's request, the court shall review the ward's continued need for a guardian.

**Section 6.** Creates s. 744.462, F.S., to require that any judicial determination concerning the validity of an instrument concerning the ward's property must be promptly recorded in the guardianship proceeding and stating that, under certain circumstances, the court shall review the ward's continued need for a guardian.

**Section 7.** Provides that this bill shall take effect upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

The Agency for Persons with Disabilities and the Department of Children and Family Services reported no fiscal impact to their agencies. Neither the Office of the State Courts Administrator nor the Department of Elder Affairs provided a written fiscal analysis.

However, it appears that the impact on the state court system will be minimal in the initial years. In the long term, as the state population grows and ages and a larger number of individuals are provided guardians, judicial circuits may be required to employ additional court monitors and other support staff.

Also, please see "Fiscal Comments."

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. These fees vary, but may run from \$500 - \$1200. While this may result in a financial consequence to the ward, it may be offset by savings that will result if the monitor prevents his or her assets from being mismanaged by a guardian.

**D. FISCAL COMMENTS:**

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. The bill, as well as existing law, is silent on the issue of an indigent ward that does not have sufficient assets to pay the monitor. Currently, some private court monitors provide their services pro bono to indigent wards, and some judicial circuits have court monitors on staff who could provide services to indigent wards. Existing law specifically prohibits such payments to full time state, county or municipal employees or officers.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

The bill provides that the court may, under certain circumstances, appoint a court monitor on an emergency basis without notice, which could raise due process concerns. Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may take advantage of that right, they must be notified. Issues associated with such due process concerns were raised and discussed as the Supreme Court's Commission on Fairness, Committee on Guardianship Monitoring explored guardianship monitoring in Florida. The Committee concluded:

Attorneys and professional guardians who appeared before the committee repeatedly expressed concern about due process issues associated with confidential communications between the court and the guardianship monitor. The committee thoroughly explored and debated the matter. While the committee is sensitive to the fact that attorneys and guardians may perceive there is a potential ex parte communication issue, the committee believes that in reality there is no impropriety as long as proper court procedures are established, published, and followed. Because

the guardianship monitor is an arm of the court and works at the direction of the judge, it is permissible for communication between the court and monitor to be confidential (see, for example, rule 2.051(c)(3)(b), Florida Rules of Judicial Administration). Nevertheless, the committee recommends that insofar as possible, the monitoring process should be transparent and open, and all communications between the monitor and the judge should be in writing, becomes part of the confidential portion of the court file, and copies provided to counsel and other interested persons as prescribed by Florida law.<sup>29</sup>

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Guardianship Monitoring

A guardian is essentially a surrogate decision-maker for an adult with disabilities who has been adjudicated incapacitated or for a minor without parents.<sup>30</sup> "When the court removes an adult's rights to order his or her own affairs, there is an accompanying duty to protect the individual."<sup>31</sup> While guardianship proceedings are initiated by an adversarial hearing, once incapacity has been determined, there are typically no "adversaries" to raise issues before the court. Hence, the courts must be proactive to detect and respond to disputes. Guardianship monitoring is a mechanism Florida courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected.<sup>32</sup>

In 1999, former Chief Justice Major B. Harding directed the Supreme Court Commission on Fairness to investigate and report on various models for guardianship monitoring.<sup>33</sup> The Commission established the Guardianship Monitoring Committee ("Committee") with a membership that included probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work, all with considerable direct experience. The Committee reviewed available literature on the subject, visited Florida courts that are experimenting with innovative guardianship monitoring methods, and conducted public hearings around the state to receive input from guardians, clerks of court, attorneys, advocates, and other interested persons. The Committee found that while most guardians and attorneys do an admirable job, more active oversight is necessary in guardianship cases.<sup>34</sup>

As a result of its work, the Committee adopted a number of findings, including the following:

- An ideal guardianship monitoring program encompasses four major service areas: (1) initial and ongoing screening and reviewing of guardians; (2) reporting on the well-being of the ward; (3) reporting on the protection of the ward's assets; and (4) case administration.
- Minimum requirements for guardianship monitoring should be established and the monitoring process should be well-defined.

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<sup>29</sup> Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards. Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003 [hereinafter *Guardianship Monitoring in Florida*].

<sup>30</sup> Guardianship Monitoring in Florida provides a more thorough definition. It provides that a guardian is a "surrogate decision-maker appointed by the court to make personal and/or financial decisions either (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by state statute." *Guardianship Monitoring in Florida, supra* at 3

<sup>31</sup> *Id.*

<sup>32</sup> *Guardianship Monitoring in Florida, supra* at 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Guardianship Monitoring in Florida, supra* at 6.

- Insofar as possible, the monitoring process should be transparent and open, and communication between the monitor and the judge should be in writing and become part of the official court record.
- It is sound public policy for guardianship monitoring to be available in every judicial circuit.
- Monitoring will require additional resources in order to adequately oversee guardianship cases. The cost of monitoring can be mitigated through the effective use of technology.
- Existing guardianship monitoring programs that utilize well-trained and experienced professional staff are working well.
- Monitoring programs that rely entirely upon volunteers are not always efficient and effective. Although well intentioned, volunteers often lack knowledge and experience with the complex medical, legal, and financial issues involved in adult guardianship cases.
- There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field; both as guardians and attorneys.<sup>35</sup>

The bill expands the provisions for the appointment of court monitors without incorporating all findings of the Committee.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On January 25, 2005, the Civil Justice Committee adopted two amendments to the bill. The amendments were technical in nature and were intended to conform the bill to HB 425. The bill was then reported favorably with a committee substitute.

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<sup>35</sup> Guardianship Monitoring in Florida, *supra* at 4.  
**STORAGE NAME:** h0191b.JA.doc  
**DATE:** 3/13/2006

HB 191

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CHAMBER ACTION

The Civil Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to guardianship; amending s. 737.2065, F.S.; excepting the contesting of trust validity by property guardians of incapacitated settlors from a prohibition against commencing certain actions; amending s. 744.107, F.S.; revising provisions relating to court monitors; requiring orders of appointment and monitors' reports to be served upon certain persons; authorizing the court to determine which persons may inspect certain orders or reports; authorizing the court to enter any order necessary to protect a ward or ward's estate; requiring notice and hearing; authorizing a court to assess certain costs and attorney's fees under certain circumstances; creating s. 744.1075, F.S.; authorizing a court to appoint a court monitor on an emergency basis under certain circumstances; requiring the court to make certain findings; specifying a time period for a monitor's authority; providing for extending such time period; requiring the monitor to report findings and

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24 recommendations; providing duties of the court relating to  
25 probable cause for the emergency appointment; authorizing  
26 the court to determine which persons may inspect certain  
27 orders or reports; providing requirements for a court  
28 order to show cause for the emergency appointment;  
29 authorizing the court to issue certain injunctions or  
30 orders for certain purposes; requiring the court to  
31 provide copies of such injunctions or orders to all  
32 parties; authorizing the court to impose sanctions or take  
33 certain enforcement actions; providing for payment of  
34 reasonable fees to the monitor; prohibiting certain  
35 persons from receiving certain fees; authorizing a court  
36 to assess certain costs and attorney's fees under certain  
37 circumstances; amending s. 744.331, F.S.; requiring a  
38 court to determine whether acceptable alternatives to  
39 guardianship of incapacitated persons exist under certain  
40 circumstances; requiring appointment of a guardian if no  
41 alternative exists; prohibiting such appointment if an  
42 alternative exists; specifying circumstances of  
43 nonexistence of an alternative; preserving certain court  
44 authority to determine exercise of certain powers of  
45 attorney; amending s. 744.441, F.S.; requiring a court to  
46 make certain findings in a ward's best interest before  
47 authorizing a guardian to bring certain actions; requiring  
48 a court to review certain continuing needs for guardians  
49 and delegation of a ward's rights; creating s. 744.462,  
50 F.S.; requiring guardians to immediately report certain  
51 judicial determinations in certain guardianship

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proceedings; requiring a court to review certain  
continuing needs for guardians and delegation of a ward's  
rights under certain circumstances; providing an effective  
date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 737.2065, Florida Statutes, is amended  
to read:

737.2065 Trust contests.--An action to contest the  
validity of all or part of a trust may not be commenced until  
the trust becomes irrevocable, except this section does not  
prohibit such action by the guardian of the property of an  
incapacitated settlor.

Section 2. Section 744.107, Florida Statutes, is amended  
to read:

744.107 Court monitors.--

(1) The court may, upon inquiry from any interested person  
or upon its own motion in any proceeding over which it has  
jurisdiction, appoint a monitor. The court shall not appoint as  
a monitor a family member or any person with a personal interest  
in the proceedings. The order of appointment shall be served  
upon the guardian, the ward, and such other persons as the court  
may determine.

(2) The monitor may investigate, seek information, examine  
documents, or interview the ward and shall report to the court  
his or her findings. The report shall be verified and shall be  
served on the guardian, the ward, and such other persons as the



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80 | court may determine. ~~The court shall not appoint as a monitor a~~  
81 | ~~family member or any person with a personal interest in the~~  
82 | ~~proceedings.~~

83 |       (3) If it appears from the monitor's report that further  
84 | action by the court to protect the interests of the ward is  
85 | necessary, the court shall, after a hearing with notice, enter  
86 | any order necessary to protect the ward or the ward's estate,  
87 | including amending the plan, requiring an accounting, ordering  
88 | production of assets, freezing assets, suspending a guardian, or  
89 | initiating proceedings to remove a guardian.

90 |       (4) Unless otherwise prohibited by law, a monitor may be  
91 | allowed a reasonable fee as determined by the court and paid  
92 | from the property of the ward. No full-time state, county, or  
93 | municipal employee or officer shall be paid a fee for such  
94 | investigation and report. If the court finds the motion for  
95 | court monitor to have been filed in bad faith, the costs of the  
96 | proceeding, including attorney's fees, may be assessed against  
97 | the movant.

98 |       Section 3. Section 744.1075, Florida Statutes, is created  
99 | to read:

100 |       744.1075 Emergency court monitor.--

101 |       (1)(a) A court, upon inquiry from any interested person or  
102 | upon its own motion, in any proceeding over which the court has  
103 | jurisdiction, may appoint a court monitor on an emergency basis  
104 | without notice. The court must specifically find that there  
105 | appears to be imminent danger that the physical or mental health  
106 | or safety of the ward will be seriously impaired or that the  
107 | ward's property is in danger of being wasted, misappropriated,

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108 | or lost unless immediate action is taken. The scope of the  
109 | matters to be investigated and the powers and duties of the  
110 | monitor must be specifically enumerated by court order.

111 |       (b) The authority of a monitor appointed under this  
112 | section expires 60 days after the date of appointment or upon a  
113 | finding of no probable cause, whichever occurs first. The  
114 | authority of the monitor may be extended for an additional 30  
115 | days upon a showing that the emergency conditions still exist.

116 |       (2) Within 15 days after the entry of the order of  
117 | appointment, the monitor shall file his or her report of  
118 | findings and recommendations to the court. The report shall be  
119 | verified and may be supported by documents or other evidence.

120 |       (3) Upon review of the report, the court shall determine  
121 | whether there is probable cause to take further action to  
122 | protect the person or property of the ward. If the court finds  
123 | no probable cause, the court shall issue an order finding no  
124 | probable cause and discharging the monitor.

125 |       (4) (a) If the court finds probable cause, the court shall  
126 | issue an order to show cause directed to the guardian or other  
127 | respondent stating the essential facts constituting the conduct  
128 | charged and requiring the respondent to appear before the court  
129 | to show cause why the court should not take further action. The  
130 | order shall specify the time and place of the hearing with a  
131 | reasonable time to allow for the preparation of a defense after  
132 | service of the order.

133 |       (b) At any time prior to the hearing on the order to show  
134 | cause, the court may issue a temporary injunction, a restraining  
135 | order, or an order freezing assets, may suspend the guardian or

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appoint a guardian ad litem, or may issue any other appropriate order to protect the physical or mental health or safety or property of the ward. A copy of all such orders or injunctions shall be transmitted by the court or under its direction to all parties at the time of entry of the order or injunction.

(c) Following a hearing on the order to show cause, the court may impose sanctions on the guardian or his or her attorney or other respondent or take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case to local law enforcement agencies or the state attorney, filing an abuse, neglect, or exploitation complaint with the Department of Children and Family Services, or initiating proceedings to remove the guardian.

(5) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for a court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 4. Paragraphs (b) and (f) of subsection (6) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.--

(6) ORDER DETERMINING INCAPACITY.--If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to

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the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. A person is determined to be incapacitated only with respect to those rights specified in the order.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person ~~In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward.~~

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,  
the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a

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durable power of attorney is to remain exercisable by the  
attorney in fact ~~When an order is entered which determines that~~  
~~a person is incapable of exercising delegable rights, a guardian~~  
~~must be appointed to exercise those rights.~~

Section 5. Subsection (11) of section 744.441, Florida  
Statutes, is amended to read:

744.441 Powers of guardian upon court approval.--After  
obtaining approval of the court pursuant to a petition for  
authorization to act, a plenary guardian of the property, or a  
limited guardian of the property within the powers granted by  
the order appointing the guardian or an approved annual or  
amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any  
jurisdiction for the protection of the estate and of the  
guardian in the performance of his or her duties. Before  
authorizing a guardian to bring an action described in s.  
737.2065, the court shall first find that the action appears to  
be in the ward's best interests during the ward's probable  
lifetime. If the court denies a request that a guardian be  
authorized to bring an action described in s. 737.2065, the  
court shall review the continued need for a guardian and the  
extent of the need for delegation of the ward's rights.

Section 6. Section 744.462, Florida Statutes, is created  
to read:

744.462 Determination regarding alternatives to  
guardianship.--Any judicial determination concerning the  
validity of the ward's durable power of attorney, trust, or  
trust amendment shall be promptly reported in the guardianship

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220 proceeding by the guardian of the property. If the instrument  
221 has been judicially determined to be valid or if, after the  
222 appointment of a guardian, a petition is filed alleging that  
223 there is an alternative to guardianship which will sufficiently  
224 address the problems of the ward, the court shall review the  
225 continued need for a guardian and the extent of the need for  
226 delegation of the ward's rights.

227       Section 7. This act shall take effect upon becoming a law.